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Attorneys for Defendant

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Ex 1

Brian Erskine,
Plaintiff,
v.
Forrest Fenn,
Defendant.

No. 3:20-cv-08123-PCT-JJT

**MOTION TO SUBSTITUTE
DEFENDANT'S ESTATE
AS A PARTY**

Pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure, Zoe Fenn Old, in her capacity as Personal Representative of the Estate of Forrest Burke Fenn, hereby moves for entry of the accompanying form of Order substituting the Estate in place of Defendant Forrest Fenn, deceased. As indicated in the Statement Noting Death of Defendant [Doc 35] filed in this case on September 8, 2020, Mr. Fenn died on September 7, 2020, in Santa Fe, New Mexico.

Under Rule 25(a)(1), "[a] motion for substitution may be made by any party or by the successors or representatives of the deceased party." 6 MOORE'S FEDERAL PRACTICE – CIVIL § 25.12[1] (3d ed. 2020) [hereinafter MOORE'S]. By Order of the First Judicial

1 District Court of Santa Fe County, Mr. Fenn's daughter, Zoe Fenn Old, was appointed the
2 Personal Representative of Mr. Fenn's Estate, and she has accepted the duties of that
3 appointment. *See* Exhibits 1-2, attached hereto. Among those duties is the power to
4 "prosecute or defend claims or proceedings in any jurisdiction for the protection of the
5 estate" N.M. STAT. ANN. § 45-3-715(A)(22). Ms. Old is therefore the "proper party" to
6 be substituted for the deceased defendant in her capacity as the Personal Representative of
7 Mr. Fenn's Estate. *See* 6 MOORE'S § 25.12[3].

8
9 RESPECTFULLY SUBMITTED this 7th day of October, 2020.

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11 SACKS TIERNEY P.A.

12
13 By: /s/ James W. Armstrong

14 James W. Armstrong

15 Brian E. Ditsch

16 SOMMER KARNES & ASSOCIATES

17 By: /s/ Karl H. Sommer

18 Karl H. Sommer

19 *Attorneys for Defendant*
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2020, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Brian Erskine
1338 Sabatina Street
Prescott, Arizona 86301
Plaintiff pro se

/s/ Toni Cooper

[2844726]

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

EXHIBIT 1

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
10/6/2020 9:47 AM
KATHLEEN VIGIL CLERK OF THE COURT
Francine Lobato

**FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO**

NO. D-0101-PB-2020-00204

**IN THE MATTER OF THE ESTATE OF
FORREST BURKE FENN, DECEASED**

**ORDER FOR INFORMAL PROBATE OF WILL
AND APPOINTMENT OF PERSONAL REPRESENTATIVE**

ZOE FENN OLD (the "Applicant") has submitted an *Application for the Informal Probate of Will and for Appointment of Personal Representative* (the "Application") requesting the informal probate of the Last Will and Testament of Forrest Burke Fenn executed on August 25, 2017 and the appointment of the Applicant as the Personal Representatives of the Estate of Forrest Burke Fenn (the "Estate") in an unsupervised administration, without bond. Based upon the statements made under oath in the Application by the Applicant, the Court FINDS:

1. Forrest Burke Fenn (the "Decedent") died on September 7, 2020 at the age of 90 years domiciled in Santa Fe County, New Mexico.
2. The Application is complete.
3. The Applicant has sworn that the statements contained in the Application are true to the best of her knowledge and belief.
4. The Applicant appears from the Application to be an interested person as defined by the laws of this state.
5. On the basis of the statements in the Application, venue is proper.
6. An original, duly executed and apparently unrevoked Last Will and Testament of Decedent executed on August 25, 2017 is in the possession of this Court; the Last Will and

Testament bears the required signatures showing valid execution and may be probated without further proof.

7. No demands of interested persons or notice of any proceedings concerning the Decedent in New Mexico or elsewhere have been received by the Applicant.

8. More than 120 hours have elapsed since Decedent's death, and the time for original probate and appointment has not expired because less than three years have passed since Decedent's death.

9. The Application indicates that no personal representative has been appointed in this or any other county of New Mexico.

10. The person who was nominated to act as Personal Representative of the Estate has renounced her right to be appointed Personal Representative of the Estate.

11. The Applicant was nominated in the Last Will and Testament of the Decedent to act as the first successor Personal Representative, without bond, in an unsupervised administration. The person named to act as the Personal Representative under the Last Will and Testament of Decedent executed on August 25, 2017 has filed her *Renunciation of the Right to be Appointed as Personal Representative* with the Court. The Applicant is qualified to act as Personal Representative of the Estate, and has priority entitling Applicant to the appointment.

THEREFORE, IT IS HEREBY ORDERED THAT:

A. The Last Will and Testament of Forrest Burke Fenn executed on August 25, 2017 is admitted to Informal Probate.

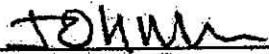
B. Zoe Fenn Old is appointed as the Personal Representative of Decedent's Estate in an unsupervised administration without bond.

C. Letters Testamentary shall be issued upon the filing of the Acceptance of the Personal Representative.


DISTRICT COURT JUDGE

SUBMITTED BY:

APRIL, DOLAN & HICKEY, P.C.

By: 
John M. Hickey
460 St. Michael's Drive, Suite 1000
Santa Fe, New Mexico 87505
(505) 988-2900
(505) 988-2901 (fax)

Attorneys for Applicant, Zoe Fenn Old

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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**
8

9 Brian Erskine,

Plaintiff,

10 v.

11 The Estate of Forrest Burke Fenn, by and
12 through its Personal Representative, Zoe
13 Fenn Old,

Defendant.
14
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No. 3:20-cv-08123-PCT-JJT

**ORDER GRANTING
SUBSTITUTION OF PARTY**

16 Upon motion, and good cause appearing,

17 IT IS HEREBY ORDERED that the Estate of Forrest Burke Fenn, by and through
18 Zoe Fenn Old in her capacity as Personal Representative, be substituted in the place and stead
19 of Forrest Fenn as the Defendant in this case.
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27 [2844810]
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